CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA.

ROLLINS V. SCOTT.

HUSBAND AND WIFE—*Husband's right of action against druggist for sale of morphine to wife addicted to the habit.* Defendants, who were regular licensed retail druggists, sold morphine to plaintiff's wife, who was, to the knowledge of the defendants, addicted to the morphine habit, and after notice from the plaintiff not to do so. The sales were also made without a physician's prescription, and without registration, as required by statute. In an action by the husband to recover damages for loss of service and deprivation of the *consortium*, it was *Held*, That the maxim *volenti non fit injuria* is inapplicable, and that defendants are liable.

Trespass on the case.

A C. Blair, J. W. Kennedy and *Henry O. Middleton,* for the plaintiff.

Flournoy, Price & Smith and *D. C. Gallaher,* for the defendants.

HON. W. G. MATHEWS, Special Judge:

This case arises upon demurrer to the plaintiff's declaration, admitting the truth of all its allegations, but insisting, on the part of the defendants, that no legal cause of action is thereby presented.

The case is novel in its application of legal principles to the facts alleged, and without reported precedents in either Virginia or West Virginia, and this fact, together with the comparative absence of precedent in America, leads the court to deem it proper by a written memorandum to state the grounds of its decision upon the demurrer.

The declaration, in substance, contains the following allegations: That the plaintiff was on the first day of January, 1899, and for a long time previous thereto, the husband of one Bettie Rollins, and that he still is such husband; and that the plaintiff and his said wife have four infant children, the oldest being fourteen years of age; that the defendants, Scott Brothers, were on said date and for some twelve years previous thereto, and still are, engaged in the business of druggists in the city of Charleston for the purpose of retailing

medicines, poisons, filling physicians' prescriptions, etc., under a state license as such druggists; that from said date and for a period of at least two years thereafter, the defendants, in violation of law and of their state license, did knowingly furnish and sell to the said Bettie Rollins, plaintiff's wife, to be used by her internally, a poisonous drug, namely, a certain preparation of opium called morphine, without the prescription of a physician, and on two or three occasions in each and every week during said period, in quantities at each sale of from twenty-six to fifty-three grains; that each and all of said sales were made knowingly by said defendants for use by said Bettie Rollins internally, in the quantities and within the time aforesaid, and without either a physician's prescription or the registration of the name of the purchaser, the date of each sale, and the amount sold as required by statute, and, hence, unlawfully, illegally, and in violation of said statute; that the sales aforesaid were in large and unusual quantities; that during said period, said defendants also sold said preparation of opium, called morphine, to the minor children of plaintiff and said Bettie Rollins, "unlawfully, illegally and without prescriptions," to be conveyed by said minor children to said Bettie Rollins, and which was actually so conveyed and delivered to her, to be used by her as aforesaid; that "all of said sales heretofore mentioned during all the said period aforesaid were so made by said defendants with knowledge and information that the said Bettie Rollins was the wife of the plaintiff, and that she was using the said morphine excessively and in such quantities as to permanently destroy her physical health and moral sensibilities, the said defendants well knowing the effect of said preparation of opium, called morphine, and the internal use of said preparation of opium called morphine, sold and furnished by said defendants during the period aforesaid to said Bettie Rollins, was sufficient to destroy the physical health and moral sensibilities of the said Bettie Rollins"; that the said morphine, so sold during said period, has in fact destroyed the physical health and moral sensibilities of the plaintiff's wife, as well as her strength, and that she is now by reason thereof a helpless, decrepit invalid, wholly incapacitated from discharging her duties to the plaintiff and their minor children, and that by reason of the use of said poison, called morphine, so sold and furnished by the defendants, she has largely lost the use of her mental and moral faculties; that during said period, said

sales were illegally and in violation of the statute so made to the plaintiff's wife and paid for by her with the plaintiff's money to the extent of at least the sum of $100 in the aggregate, and that each and all said sales, so illegally made, were "without the knowledge or consent of the plaintiff"; that the plaintiff has expended large sums of money for medicines and medical treatment of his wife, made necessary by the internal use of said drug so unlawfully furnished by the defendants as aforesaid; that prior to the date of the beginning of the sales by the defendants the plaintiff's wife was in good health, and the plaintiff and his wife lived happily together as husband and wife, and that his wife was an affectionate, dutiful and industrious wife, etc., and fully discharged all of her conjugal, matrimonial and domestic duties, both to her husband and their minor children; that since said time and by reason of said excessive internal use of said drug, sold and furnished as aforesaid, plaintiff's said wife has become and is now, by reason thereof, "weak in body, mind and morals, cross and wholly incapable of discharging her duties as wife and mother," and affirmatively avers that the defendants, "at the time of such illegal and unlawful sales of said preparation to the plaintiff's wife, well knew that said preparation, so illegally furnished by them to the said Bettie Rollins, was destroying and would destroy the bodily health, mind and morals"; that by reason of the premises said plaintiff has been and is damaged, his family broken up, etc., to the extent in damages of $10,000. By an amendment to said declaration it is also alleged that by reason of said sales and acts of the defendants, the plaintiff has been and is deprived of the *consortium* of his said wife, and of the discharge by her of the usual and ordinary duties of a wife, and that their children are, in like manner, deprived of the care and nurture of a mother.

At the outset the question presents itself whether the declaration states damages resulting to the plaintiff proximately by reason of the acts alleged to have been done by the defendants, or by reason of the exercise of the wife's free will interposing between the defendants' acts and the damages alleged as resultant. It is urged that the maxim *"volenti non fit injuria"* applies, and that upon the face of the declaration it appears that the damages alleged are the resultant of the voluntary acts of the plaintiff's wife, in using said drug to excess after purchasing it, and not of the defendants' acts in selling her the same.

In my opinion, and realizing both the importance and the closeness of this question, the declaration by direct and necessary inference, if not indeed sufficiently by direct averment, sufficiently alleges facts showing the natural and ordinary result of such use of the drug in the quantities and amounts alleged to have been sold and used within the times specified, as well as the actual result thereof in this particular case, within the knowledge of the defendants, to establish upon demurrer that the plaintiff's wife by such use had become incapable of rational action in the matter and to negative the presumption of the interposition of her free will between the defendants' acts and the resulting damages. If this is done, either by direct averment or necessary implication from the direct averments of the declaration, then the damages alleged are the direct and not the remote consequences of the defendants' acts, and the injury occasioned thereby analogous to injuries done through a *non compos mentis,* or to property.

An examination of the authorities and decisions shows that the general principles of law involved in the case presented by the declaration, as well as their application to the allegations of facts therein, are not wholly novel or without reported precedent. In the essential particulars the same principles were invoked and the same facts involved in the case of *Holleman* v. *Harward,* 119 N. C. 150, 34 L. R. A. 803, 56 Am. St. Rep. 672.

In that case the plaintiff alleged that he had sustained damages by reason of the defendants, who were druggists, selling laudanum to his wife, knowing at the time that she was using the same in large quantities and as a beverage to the injury of her health. It is matter of common and general knowledge that, while the preparation known as morphine is the active principle of opium, laudanum is merely a tincture of the same drug. In the North Carolina case, the declaration alleged that the plaintiff's wife, some years prior to the institution of the action, suffered from a temporary illness and was forced to take preparations of opium for relief, and that from this (legitimate) use of the drug formed the laudanum habit; that the plaintiff, upon discovering the same, notified the defendants not to sell his wife any preparation of opium except on his written order, said defendants having formerly done so with knowledge of her excessive use thereof, but that notwithstanding such knowledge and notice, defendants for pecuniary gain contin-

ued to sell large quantities of laudanum almost daily to plaintiff's wife, which drug they knew she used as a beverage and that she was, through the use of said drug, wrecking herself in mind and body; that "by reason of the use of said drug as a beverage she had become a mental and physical wreck, and almost deprived of moral sensibility, unfitted and disqualified to attend to her household duties, or to the care, nurture or direction of her children: and that by the means aforesaid, so furnished by the defendants knowingly, wilfully and unlawfully, the plaintiff had been deprived of the society of his wife, of her services in her home, and his children had suffered from neglect and want of motherly care."

In that case the defendants relied, in support of their demurrer, upon practically and almost literally the same grounds urged by the defendants in the case at bar, namely, that no principle of the common law justifies such an action, and no statute confers it as it does do, in certain instances, in the case of sale of liquor to minors, habitual drunkards, etc.; that the novelty of such an action, in connection with the silence of elementary text-books thereon, furnished strong countenance to their contention; that while the complaint might sufficiently allege great moral wrong, it yet alleged no legal wrong on the part of the defendants, and no damage resulting from their acts; that ancient restrictions upon married women have been in large measure repealed by legislation, and that she now has the same freedom and liberty of personal action as her husband, and that because he cannot now legally restrain her acts, her locomotion, or her will, so neither can he prevent the purchase and excessive use by her of such a drug; that the sale of such drug is a lawful business, and that while, by such excessive use, the wife might inflict a great moral or even a legal wrong upon her husband, the defendants did not do so by their sale of the drug.

The court, however, in that case, discussed each of the points urged, and determined that the legal principles involved and applicable were not new, but old, sound and consistent, and might be summarized in "whoever does an injury to another is liable in damages, whether such injury is to the property, the person or the reputation of another." *Dexter* v. *Spear,* 4 Mason, 115; 3 Bl. Comm. p. 123.

I am of opinion that whatever restrictions upon married women, their personal liberty or their property rights, may have been re-

moved by the West Virginia statutes, or by modern liberal judicial construction, no change has been effected in regard to the fundamental and recognized conjugal relations and duties arising from the contract of marriage, namely, the rights of society, *consortium,* affection, and matrimonial services, and further I am of opinion that, both at common law and under our statutes, one who, voluntarily or for pecuniary gain, knowingly and wilfully deprives or assists in depriving either consort of such rights and duties, incurs legal as well as great moral responsibility therefor.

In the North Carolina case it was also earnestly urged that the sale of laudanum was a lawful business, unrestrained by statute, and that therefore a lawful sale of a lawful commodity could not occasion legal responsibility. That court held, however, following a decision of the Supreme Court of New York, hereinafter cited, that in respect to such sale "its lawfulness or unlawfulness depends upon the circumstances of the sale, and the uses and purposes to which it is to be applied."

As I understand that case and decision, it differs from the case at bar in four particulars, none of which I deem material, viz:

(1) In alleging notice to the defendants not to sell the drug to plaintiff's wife except upon written order. As defendants' counsel admit and contend, however, such notice, if given, could have had no legal effect in the absence of a statute, and hence could only serve to give the defendants actual knowledge of the excessive use of the drug by plaintiff's wife. This knowledge the declaration alleges they already had, both actually and necessarily from their knowledge of the usual and natural effect of the drug in the quantities sold.

(2) In that case the opinion states that in North Carolina the husband is entitled to his wife's earnings and may contract to sell her services to another and sue therefor in his own name, apparently relying upon the defendants' acts as having therefore deprived the husband of this pecuniarily valuable right. In West Virginia a wife's earnings are her own and not her husband's. But her society, affection, conjugal services and the discharge of her matrimonial duties are still, legally and morally, the husband's, and in law as well as in fact are surely of the highest value. If so the wrongful deprivation thereof by another constitutes a legal as well as a moral wrong.

(3) The drug habit in that case was alleged to have been acquired by the wife in an innocent manner while attempting to obtain relief from a previous temporary illness. The declaration at bar does not allege how the habit was contracted, and in my judgment if contracted without such cause, but by reason of the defendants' acts alone, then it would seem that the present case as alleged is the stronger and more aggravated.

(4) In the North Carolina case it was not alleged that the sale of the drug, laudanum, was *per se* illegal or in violation of statute law. In the present case it is alleged that each and every sale was made by the defendants without complying with sections 9 and 14 of Chapter 150 of the Code, which sections require all druggists before delivery to purchasers of certain enumerated drugs, among them morphine, to distinctly label the same with the word "poison" and also a device bearing the death's head and cross-bones, and also to register in a book to be kept for that purpose the date, the name of the purchaser and the amount sold, and to preserve such register at all times open to inspection of "the proper authorities." This statute constitutes all sales not so made misdeamors, punishable by fine. The well recognized object and purpose of this statute is for the prevention and detection of crime. I do not consider that the violation of the provisions requiring registration and labelling in any way in and of itself constitutes a substantive part of the plaintiff's cause of action, as the plaintiff was not damaged by such failure to register or label and could not legally demand access to such register if it had been kept. Yet the fact that such sales are alleged to have been made in violation of such statute, and therefore to have been *per se* illegal, is proper matter of allegation as inducement to the gravamen or by way of aggravation.

In *Hoard* v. *Peck*, 56 Barb. (N. Y.) 202, a declaration substantially the same as in the present case was sustained after full discussion and consideration by the Supreme Court of New York. In that case the declaration was also for the sale to the plaintiff's wife of the tincture of opium, called laudanum, and differed in no essential particular from the declaration in the North Carolina case and in this case. It is true that the declaration there alleged the sales to have been made secretly and clandestinely to the wife, but in the present case, even should such averment be deemed material and of the substance, which I do not consider it to be, it would seem to be

substantially covered by the plaintiff's averment that the sales here were made to his wife, in each and every instance, without the knowledge or consent of the plaintiff. In the New York case, Morgan, J., dissented and sets out at length his reasons therefor, all of which reasons are discussed in the majority opinion and are substantially the same urged in the case at bar.

I have found no reported case contrary to the conclusions reached in the cases above cited. Without quoting at length, I consider that the case of *Barnes* v. *Allen,* 30 Barb. 668, and *Riden* v. *Grimm Bros.* (Tenn.), 35 L. R. A. 589, in their principles tend to support the principles announced and conclusion reached in the foregoing cases. For the reasons above given, and further detailed in the opinions referred to, I am of opinion that the declaration states a legal wrong done to the plaintiff by the defendants, damages resulting therefrom, and accordingly the demurrer is *Overruled.*

EDITORIAL NOTE.—Virginia has a statute similar to that of West Virginia, cited in the principal case, Virginia Code, section 1764, as amended, Pollard's Supplement *in loc.* The basal proposition enunciated in the ruling of the court, while arising, it is true, out of circumstances somewhat unusual, is nevertheless supported by abundant authority—namely, that a husband may have his separate action for the loss of service and *consortium* arising from a tort committed upon or against his wife. The doctrine of *volenti non fit injuria* was properly held inapplicable—for the obvious reason, it seems to us, that whatever the wife may have done, the plaintiff, the husband, had never consented to the injury. In *Philippi* v. *Wolff,* 14 Abb. Prac. (N. S.) (N. Y.) 196, the consent of the wife to the procuring of an abortion upon her was held not to preclude her husband's action therefor. In *Nixon* v. *Ludlam,* 50 Ill. App. 253, it was held that an action lies by a husband, in his right as such, for damages sustained by him by being deprived of the society and assistance of his wife by an injury caused by the defendant. See also *Grace* v. *Hudson River R. Co.,* 28 Barb. 9; *McKinney* v. *Western Stage Co.,* 4 Iowa, 420; *Berger* v. *Jacobs,* 21 Mich. 215. In *Long* v. *Morrison,* 14 Ind. 595, a husband was held to have a right of action against a physician for malpractice in treating his wife. And others to the same effect.

We concur also, as to Virginia, in the opinion that the recent Married Woman's legislation does not bar the right of the husband to recover. Even our notable Marital Rights Divorce Act of March 12, 1900, sweeping, destructive of the former law and generally confusing as it is, at least stops short of taking from the husband the right to sue for torts against himself, and of giving the wife the sole right to sue for them. Our Court of Appeals in 1896 had the question indirectly before it in *Richmond Railway Company* v. *Bowles,* 92 Va. 738, 24 S. E. 388. An instruction had been granted in

an action *ex delicto* by a married woman, authorizing the jury, in estimating damages, to consider among other things her loss of time. This was disapproved, the court saying: "This seems to involve elements of damage which would be properly recoverable by the husband, and which do not constitute any part of the separate estate of the defendant in error." This was, of course, before the passage of the act above mentioned. Doubtless, under the present law the wife's time is her own, and a similar instruction would doubtless now be approved. But the element of *consortium* or society was not before the court, and we deem that, as to it, the logic of the question is altogether with the ruling in the principal case. Let Virginia benedicts rejoice that this has been left them, and that there is nothing in the Act to take away their right of action for its loss.